In the Supreme Court of Canada

ON APPEAL FROM THE JUDGMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

IN THE MATTER OF A PETITION OF RIGHT

BETWEEN:

THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR SCHOOL SECTION NUMBER TWO IN THE TOWNSHIP OF TINY AND THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR THE CITY OF PETERBOROUGH ON BEHALF OF THEMSELVES AND ALL OTHER BOARDS OF TRUSTEES OF ROMAN CATHOLIC SEPARATE SCHOOLS IN THE PROVINCE OF ONTARIO,

(*Suppliants*) APPELLANTS.

AND

HIS MAJESTY THE KING,

(*Respondent*) RESPONDENT.

RESPONDENT'S FACTUM

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(*Suppliants*) Appellants,

—AND—

HIS MAJESTY THE KING

(*Respondent*) Respondent.

RESPONDENT'S FACTUM.

PART I.

STATEMENT OF FACTS

1. This is an appeal by the suppliants in a Petition of Right on behalf of themselves and all other boards of trustees of Roman Catholic Separate schools in the Province of Ontario from a judgment of the First Appellate Division of the Supreme Court of Ontario pronounced on December 23, 1926, and affirming the judgment after trial of the Honourable Mr. Justice Rose pronounced on May 13, 1926, which dismissed the petition.

2. In the petition as heard at the trial the board of trustees of the Roman Catholic Separate Schools for school section number 2 in the Township of Tiny, a rural board, was the sole suppliant; but to preclude any doubts in regard to the status of a rural board to represent urban boards of trustees in respect of all aspects of the relief prayed, the board of trustees of the Roman Catholic Separate Schools for the City of Peterboro was added as a suppliant, with the consent of the respondent and by direction of the Appellate Division. The fiat of his Honour the Lieutenant-Governor of Ontario was granted to the amended petition.

3. The questions involved in the petition are whether, under the law of the late Province of Canada relating to Roman Catholic Separate Schools in Upper Canada, the appellants or any class of persons they represent had certain rights and privileges by law with respect to the denominational schools at Confederation, secured to them by subsection 1 of section 93 of the British North America Act, which have been prejudicially affected by statutes of the Province of Ontario and regulations of the Department of Education.

Record.

4. The rights in question which the appellants claim to be prejudicially affected by the Statutes and regulations impeached are, briefly,—

(a) A right of each separate school to a share in all legislative grants for the support of common schools, or for common school purposes (as the appellants contend "common schools" were constituted and defined
p. 4, l. 26. by law at Confederation), on a basis of the average attendance of pupils at such school as compared with the whole average number of pupils attending school in the same municipality.

(b) A right of the trustees of every separate school board to give such instruction and maintain such courses of study and grades of education in the separate schools under their charge, at least up to matriculation in the universities, as the trustees in their discretion might exclusively determine; and

(c) A right of the supporters of separate schools to be exempted from payment of all rates imposed for the support of common schools, as so
p. 4, l. 40. defined, which the appellants contend include all rates imposed for the support of continuation schools, high schools and collegiate institutes in the Province not conducted by themselves.

5. The Acts and parts of Acts which, so far as they purport to enact a different method of apportioning the fund annually granted for common school purposes other than the basis of average attendance, are said to prejudicially
p. 4, l. 1. affect the rights of the appellants with respect to legislative grants are men-
p. 3, l 32. tioned in paragraph 8 of the petition and those which prejudicially affect the
p. 5, l. 1. right to exemption from rates imposed for common schools in paragraph 14.

p. 6, l. 25. 6. The prayer of the petition accordingly is that it may be declared:—

(1) That, in so far as they affect the suppliants rights the statutes referred to in the preceding paragraph hereof are invalid and ultra vires.

(2) That the suppliants have the right to establish and conduct courses of study and grades of education such as are now conducted in continuation schools, collegiate institutes and high schools and that all regulations purporting to prohibit or limit such right are invalid and *ultra vires*, and

(3) That separate school supporters are exempt from payment of rates imposed for the support of any such secondary schools of the Province not established or conducted by them.

7. The suppliant, the rural board of Tiny Township, also asks for judgment for the difference between the amount awarded to it under the legislative

grant for the year 1922 and the amount it claims it would have received under the statutes in force at Confederation. The details are given in paragraphs 16 to 23 of the petition. No similar claim is made by the suppliants, the urban separate school Board of the City of Peterboro. Record p. 5, l. 29.

8. The school law in force in Upper Canada at Confederation relating to Roman Catholic separate schools was contained in an Act of the Parliament of Canada passed in 1863 (26 Vict. cap. 5) and entitled "An Act to restore to Roman Catholics in Upper Canada certain rights in respect of separate schools," and in an Act of the said Parliament entitled "The Upper Canada Common School Act" (C.S.U.C. cap. 64) and in any regulations of the Council of Public Instruction for Upper Canada made pursuant to these enactments and applicable to separate schools. The law relating to Grammar Schools in Upper Canada was contained in an Act respecting Grammar Schools (C.S.U.C. cap. 63) as amended by an Act of the Parliament of Canada passed in 1865 (29 Vict. cap. 23) and in regulations made by the Council as thereby provided.

9. The Separate Schools Act of 1863 (26 Vict. cap. 5) hereinafter referred to as the Act of 1863 which recites that "it is just and proper to bring the provisions of the law respecting separate schools more in harmony with the provisions of the law respecting common schools" repealed all the sections of the Consolidated Act respecting separate schools (C.S.U.C. 1859 cap. 65) which related to separate schools for Roman Catholics (secs. 18 to 36 inc.), which had been consolidated from the provisions of an Act relating to separate schools for Roman Catholics passed in 1855 (18 Vict. cap. 131) and commonly known as The Taché Act. The important differences between the Act of 1863 and the consolidated statute are pointed out in the judgment of the Hon. Mr. Justice Rose. p. 192, l. 15 et seq.

10. Among the provisions to bring the law respecting separate schools more in harmony with the law governing common schools generally, in accordance with its preamble, the Act of 1863 enacted that

(a) The trustees of Separate Schools should have all the powers in respect of Separate Schools tha t the trustees of Common Schools had and possessed under the provisions of the Act relating to Common Schools (section 7.)

(b) The trustees of Separate Schools should perform the same duties and be subject to the same penalties as trustees of Common Schools (section 9);

(c) The teachers of Separate Schools should be subject to the same examinations and receive their certificates of qualification in the same manner as Common School teachers generally (section 13);

(d) All judges, members of the Legislature, the heads of the municipal bodies in their respective localities, the Chief Superintendent and Local Superintendent of Common Schools and clergymen of the Roman Catholic Church, should be visitors of Separate Schools (section 23); and

(e) The Roman Catholic Separate Schools (with their registers) should be subject to such inspection as might be directed from time to time by the Chief Superintendent of Education, and should be subject also to such regulations as might be imposed from time to time by the Council of Public Instruction for Upper Canada (section 26).

11. The material powers and duties of trustees of common schools will be found in sections 27 and 79 of the Common School Act of Upper Canada (C.S.U.C. 1859, cap. 64) as relating to trustees of rural and urban common schools respectively.

12. There were local superintendents in each county for the rural school sections, appointed annually by the County Council (ib. sec. 53); and for each city, town and village by the board of school trustees for the municipality (ib. sec. 61). The local superintendent or superintendents in the county, with the Grammar School trustees, constituted the County or Circuit Board of Instruction (ib. secs. 94 and 95), who examined and gave certificates of qualification to the teachers of common schools in the county (ib. sec. 98 (4). The duties of the local superintendent with respect to the schools within his jurisdiction are prescribed by section 91.

13. The chief executive officer under the Common School Act of 1859 for the Province was the Chief Superintendent of Education for Upper Canada, who was appointed by the Governor by Letters Patent (sec. 103) and whose principal duties and powers are defined by sec. 106 of that Act. He could give, on the recommendation of the teachers in the Normal School a certificate of qualification valid in any part of Upper Canada to a teacher who had been a student in the Normal School (sec. 107).

14. The office was created by the Common School Act of 1846 (9 Vict. cap. 20). Dr. Egerton Ryerson, who was the first chief superintendent of Education, was appointed in 1846 and held the office continuously until 1876. Upon his appointment he visited Europe to investigate the educational systems of various countries and upon his return submitted a report of his observations, with special reference to the educational requirements of Upper Canada (exhibit 57), which is referred to by the learned trial judge.

p. 193, l. 39 et seq.

15. The supreme authority over education under the legislation in force at Confederation was the Council of Public Instruction, consisting of nine persons appointed by the Governor (sec. 114) of which the Chief Superintendent of Education was a permanent member. The Council, which was established by the Common Schools Act of 1850 (13-14 Vict. cap. 48 sec. 36) possessed the powers regarding the organization, government, discipline and classification of common schools conferred especially by section 119 of the Common School Act of 1859, and the additional powers and duties prescribed by that Act.

16. In 1876 all the powers and duties of the Council of Public Instruction were transferred to a Department of the Provincial Government called the Department of Education; and all the powers, duties and functions of the Chief Superintendent of Education were transferred to the Minister of Education for the Province (39 Vict. cap. 16, sec. 1).

17. The learned trial judge has given a concise and accurate chronological statement in detail of the course of legislation in reference to Common Schools, Separate Schools and Grammar Schools in the late Province of Upper Canada from the first Common School Act of 1816 relating to Upper Canada (56 Geo. 3, cap. 36) down to Confederation. He has also referred briefly to the more important of the official reports, circulars and instructions of the Chief Superintendent issued at various periods prior to 1867, and in addition, to the statutes and regulations since Confederation of which the appellants mainly complain. It is assumed that the accuracy of the learned judge's exhaustive historical investigations will not be questioned by the appellants, subject, of course, to the right of counsel to dispute the inferences drawn therefrom by him or the learned justices of the Appellate Division.

Record pp. 178-193. pp. 193-199.

18. The statutes and regulations relating to high schools and continuation schools are examined by Hon. Mr. Justice Rose at pages 199, l. 37 to 206, l. 10 of the Case, and the objections to their validity considered at p. 209 l. 11, p. 217, l. 32. The effect of the Department of Education Act (R.S.O. 1914, cap. 265, sec. 6) as amended, which lays down the rules to be followed by the Minister in distributing the legislative grants is stated by his lordship at page 207, l. 27.

p. 199, l. 37 to p. 206, l. 10. p. 209, l. 11 to p. 217, l. 32. p. 207, l. 27.

19. The claim in reference to legislative grants is based upon the provisions of section 20 of the Act of 1863 which is set out in Part III.

20. In support of the claim that the appellants are entitled to conduct the courses of study now taught in the secondary schools the appellants allege that it is established by the exhibits filed that, prior to Confederation, such courses of study were in fact taught in the common and separate schools of Upper Canada. They refer *inter alia* to the annual reports of the Chief Superintendent for the year 1849 Exhibit 7; for the year 1852 exhibit 10; for the year 1867; and in particular to the cases of the common schools at London in the annual report for 1863 (exhibit 13), as referred to in a report of the local Superintendent at London, and at Hamilton, exhibit 12, 1855, as establishing their contention that instruction was given, as alleged, in some common schools up to matriculation at the University.

p. 94, l. 43 to p. 95, l. 20. p. 96, ll. 10-20. p. 98, l. 36 to p. 99, l. 16. p. 105, l. 6. pp. 102, and 103. p. 100, l. 20.

21. They also rely upon the provisions of the Common School Act of 1869 (sec. 79 (8)) whereby the trustees of urban schools are empowered to determine the "kind and description" of the schools and upon the duty of trustees under section 27 (16) of this Act to permit all residents in the section between the ages of 5 and 21 years to attend the schools as creating a legal right to give the grades of education and courses of study as claimed.

22. Upon the foregoing questions Mr. Justice Rose was of opinion that section 20 of the Act of 1863 does not entitle the separate schools to share in the legislative grants in question on a basis of average attendance as claimed, and that the Department of Education Act as amended is valid and binding upon separate schools for the following among other reasons:

(a) The right under that section was a right to share in grants and allotments made or to be made by the legislation of the Province of Canada only.

p. 219, ll. 19-45.

Record p. 220, l. 40.

(b) There is no proof that the legislation and regulations impeached in the petition affect the alleged rights prejudicially. The general grants for rural and urban public and separate schools are "apportioned between the public "and separate schools as nearly as is practicable in the manner prescribed by the acts of 1859 and 1863;" and there is no evidence that under the new system of apportionment the separate schools receive a smaller portion of the total than they would receive if the former system were restored.

p. 221, l. 40.

(c) As to the special grants impeached, public and separate schools are treated alike and each school must earn the right to participate. Neither section 20 nor any other section of the Act of 1863 provided for the allotment of any money for use in the municipality; and, to find what money was to come into the municipality for apportionment, resort must be had to the Common School Act of 1859. By section 106 of that Act the Chief Superintendent was to apportion annually to the municipality "all monies granted or provided by the Legislature for the support of Common Schools in Upper Canada, and not otherwise appropriated by law." The right of a Separate school was a right at most to share in such of the grants for Common school purposes as were unappropriated, and were therefore to be apportioned under section 106 of the Common School Act. He reached the conclusion that the special grants impeached in these proceedings are monies that are "appropriated by law" within the meaning of this provision.

p. 223, l. 4.

p. 221, l. 2.

(d) The "class of persons" whose rights are preserved is composed of the Roman Catholic inhabitants of the Province, or the supporters of Roman Catholic Separate Schools; and there is no evidence of prejudice to the class.

23. The claim of the appellants that they are entitled to conduct the courses of study maintained in continuation schools, high schools and collegiate institutes is negatived on the following grounds,—

p. 209, l. 41.

(a) Trustees of Separate Schools did not have a right by law to teach such subjects in their common schools at Confederation.

(b) Under the Acts of 1863 and of 1859 Separate School trustees were bound to obey any regulation which the Council of Public Instruction for Upper Canada had seen fit to pass with the object of fixing the point of commencement of the Grammar School course and the point beyond which the education of pupils in the common schools should not proceed. The trustees had the right to do only such work in the schools as the regulations of the Council of Public Instruction should declare to be the work of common schools.

p. 211, ll. 11-16.

l. 219, l, 1.

(c) The Separate Schools were subject to regulation in regard to the courses of study and branches of education to be taught in the schools; and the existence of a right to regulate rather than the absence of any regulation is the important consideration.

213, l. 40.

(d) The fact that pupils up to 21 years of age were allowed to attend rural school (secs. 27 (16) and 79 (18) of the Act of 1859) did not entitle the trustees to give whatever instruction might be needed by persons of that age. Nor does section 79 (8) give the trustees the right to give such instruction as they might determine. Conceding a power of urban trustees to grade their schools under this provision, the schools to be graded were "common" schools, and the grading was to facilitate common school work. Record 212, l. 35.

(e) The educational system of Upper Canada was established at Confederation by statutes, regulations and programmes of studies. The grammar schools were "intermediate" schools between the common schools and the university. The secondary schools of Ontario fill the intermediate place that the grammar schools were intended to fill and they cannot be called "common" schools. p. 198, l. 45. p. 199, l. 20. p. 215, l. 36.

(f) Continuation schools were established since Confederation for the purpose of doing some of the secondary work of the old grammar school. Their purpose is to continue educational work for pupils of rural and small urban districts by providing two or more years of high school training. p. 217, l. 10. p. 216, l. 33.

24. The claim to exemption from rates imposed for the secondary schools of Ontario fails when it is determined that the secondary schools are not "common schools" within sec. 14 of the Act of 1863.

25. From this judgment the suppliants appealed to the Appellate Division. The appeal was heard by the First Appellate Division composed of Sir William Mulock, C.J.O., Magee, Hodgins and Ferguson JJ.A. and Grant J. who were unanimously of opinion in dismissing the appeal.

26. The conclusions of the Chief Justice may be briefly stated as follows:

(a) The rights and privileges enjoyed by separate schools within the meaning of section 93 ss. 1 of the British North America Act are limited to those expressly conferred by the legislature of the late Province of Canada in force at the Union.

(b) The annual grants referred to in section 20 of the Act of 1863 are grants for division among all common schools, generally, in the Province, and do not include grants of a specific character. Section 20 must be read with section 106 of the Common School Act of 1859, whereby separate schools are entitled to share only in the balance of grants not otherwise appropriated by law. The general and special grants under the impeached statute of 1924 (14 Geo. 5, cap. 82) are not grants for division among all common schools generally, but are "appropriated by law," and are not part of the grant in which separate schools are entitled to share. Annual grants to continuation schools, high schools and collegiate institutes are also "appropriated" by the legislature and are therefore excepted from the fund divisible among all common and separate schools. The only moneys of the nature of "public grants, investments and allotments" in section 20 are the Common School Fund mentioned in 22 Vict. (1859) cap. 26.

(c) Continuation schools, high schools and collegiate institutes are not "common schools" as they existed at the Union. There are fundamental differences between common schools and grammar schools, e.g., in the appointment of trustees, the territorial limits of the trustees' jurisdiction, and the education to be given. By legislation since the Union the common schools are now public schools; and the grammar schools are "high schools," as are also continuation schools and collegiate institutes.

(d) The suppliants did not have the uncontrollable right to conduct in separate schools the courses of study carried on in the secondary schools. An examination of the provisions of the Act of 1863 and of the Common School Act set out in the judgment shows that the latter Act required trustees of common schools to conduct education in them in accordance with the regulations; and by section 7 of the Act of 1863 the like duty rested upon trustees of separate schools.

27. Mr. Justice Hodgins expressly agrees with both the reasoning and conclusions of Mr. Justice Rose, but adds some further considerations by reason of the public importance of the case.

(a) As he reads the statutes and records as evidenced by the exhibits there was never any idea of letting separate schools cut loose from the system of elementary education, or of permitting the setting up of a new kind of school. Separate schools were part of the common school system. All were to advance or recede uniformly with respect to the education given therein. This view is supported by a reference to the earlier legislation with respect to separate schools in Upper Canada.

(b) He agrees that section 20 of the Act of 1863 deals only with grants by the then Province consisting of both Upper and Lower Canada. It was not the intention that any schools, separate or otherwise, should participate in the grants without being obliged to give in their schools that common school education, the maintenance of which was the fundamental purpose of the grants. Section 20 in no way ties the hands of the granting authority so as to cause it to lose control over the proper application of the funds so granted nor over the character and standard of schools in the matter of education. The section does not extend to anything but a grant in which every municipality is entitled to participate for giving a common school education, and does not apply to a specific grant for defined and definite purposes. Public grants must always be subject to the conditions and provisions which Parliament chooses to annex to them and a demand to share cannot be legally made unless these conditions and provisions are complied with.

(c) The rights in respect of denominational schools were the establishment and conduct of them by and under the supervision of the Church, subject to regulations made by statute law. It is entirely for the Provincial authorities to define the limit between primary and secondary education. Rights and privileges in relation to education are subject to an appeal, not to the courts, but to Federal authority.

He also examines the decisions in the Board of School Trustees v. Grainger, 25 Grant 670 and in Ottawa Separate Schools v. MacKell 1917, A.C. 62 and 76.

28. Mr. Justice Grant, who also approves of the decision of Mr. Justice Rose, sets out his views on what he considered were the main points of the case.

(a) He finds nothing in the Acts of 1863 and 1859 to support the contentions of the appellants in respect to the instruction that could be given by the trustees of common or separate schools at Confederation. The course of legislation leading up to these enactments indicates a fairly definite policy, aiming at the establishment of a general system of education covering the entire Province, whereby all children, irrespective of creed, should be assured of a rudimentary education in the common or separate schools. The determination of the education was placed in the hands of the Council of Public Instruction appointed by the Legislature. It seems clearly intended that the separate schools were to be maintained in the same manner, with the same standards and under the same system, subject always to the control of the legislature, as were other common schools.

(b) The British North America Act preserved to any denomination the right to carry on schools taught by its own duly qualified teachers using authorized text books, surrounding their children with the denominational atmosphere and giving them denominational instruction, but always the legislature is supreme to determine the "education" to be furnished. The denomination may carry on the schools but the Province controls the education. If the Act or decision is complained of with respect to education, no legal right being invaded, the Courts have no jurisdiction and the only recourse is that afforded by subsections 3 and 4 of section 93.

(c) The rights or privileges respecting "denominational schools" were, in general terms, to have their schools managed by their own trustees, with their children being taught together by (duly qualified) teachers of their own faith, always using only authorized text-books and being subject to the central regulating power; and to have denominational teaching. The schools would be denominational, in their teaching and management, their atmosphere and environment; the education would be what the legislature, or the central authority by it appointed, might from time to time determine.

29. Mr. Justice Magee and Mr. Justice Ferguson were content to concur in the reasoning and conclusions of the learned trial judge. Mr. Justice Magee added a few observations to the effect that the legislature was not bound to provide organization for other than the local educational bodies already constituted and that neither any one of these small bodies, nor all combined, could claim moneys intended for broader and higher organizations such as high schools and collegiate institutes.

30. From the judgment of the Appellate Division the suppliants have appealed to this Court.

PART II.

The Respondent submits that the judgments of the Courts below are right and should be affirmed; that the statutes and regulations impeached by the petition are valid; that the suppliants have not the right to establish and conduct courses of study and grades of education such as are now conducted in continuation schools, collegiate institutes and high schools in Ontario; and that Roman Catholic separate school supporters are not exempt from payment of rates imposed for the support of the secondary schools aforesaid.

PART III.

ARGUMENT.

31. Section 93 of the British North America Act is as follows:

"93. In and for each Province the Legislature may exclusively make laws in relation to education subject and according to the following provisions:

"1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of person have by law in the Province at the Union.

"2. All the powers, privileges and duties at the Union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

"3. Where in any Province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

"4. In case any such Provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper Provincial authority in that behalf, then and in every such case, and as far as only as the circumstances of each case require the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and to any decision of the Governor-General in Council under this section."

32. Section 20 of the Act of 1863 (26 Vict. cap. 5), on which the appellants rely in support of their claim to a share of all legislative grants for common school purposes, enacts as follows:

> "Every Separate School shall be entitled to a share in the fund annually granted by the Legislature of this Province for the support of Common Schools, and shall be entitled also to a share in all other public grants, investments and allotments for Common School purposes now made or hereafter to be made by the Province or the Municipal authorities, according to the average number of pupils attending such school during the twelve preceding months, or during the number of months which may have elapsed from the establishment of a new Separate School, as compared with the whole average number of pupils attending School in the same City, Town, Village or Township."

33. Legislation which falls within subsection 1 of section 93 of the British North America Act is null and void. If the suppliants have a remedy under subsection 3, subsection 1 does not apply (Brophy v. A.G. of Manitoba 1895 A.C. 202, 216-218). Subsection 1 should, therefore, be so construed as to maintain for the provinces the most comprehensive powers of legislation in relation to education that are consistent with a due regard for the rights of the minority under all the provisions of the section.

34. The only rights which are protected by subsection 1 are rights (a) with respect to denominational schools which (b) any class of persons had (c) by law at the Union.

35. A right by law within that subsection is a vested legal right for which there was an available legal remedy for its enforcement through the Courts in existence at the Union.

Maher v. Portland (1874), Wheelers Confederation Law of Canada 338, 367.
Ottawa Separate School Trustees v. Mackell 1917 A.C. 62.
City of Winnipeg v. Barrett 1892 A.C. 445, 453.

36. A right or privilege with respect to denominational schools which is prejudicially affected under subsection 1 of section 93 must be a right or privilege of a denominational character.

37. The rights or privileges protected under subsection 1 of section 93 must be of such character as are capable of being extended under subsection 2 to the dissentient schools in Quebec.

38. The right or privilege which any class of persons represented by the appellants had by law at Confederation and secured for them by subsection 1 of section 93 was nothing more than a right or privilege to establish and maintain a common school as provided by the Separate Schools Act of 1863 in which the exercises of religion or devotion, the reading and study of religious books, and religious instruction might be denominational and in accordance with the tenets and faith of the Roman Catholic denomination.

39. The secular education to be given in any such separate school shall comprise such courses of study or grades of education as the Legislature of Ontario or the Department of Education may determine as the proper courses of study or grades of education to be given in what the Legislature may determine to be the common, or primary, schools in the educational system of the Province.

40. All such legislation in relation to secular education is within the exclusive jurisdiction of the Province, subject only to the provisions of subsections 3 and 4 of section 93 of the British North America Act whereby, in case any right or privilege of the Roman Catholic or Protestant minority of the Province in relation to education is thereby affected, an appeal lies to the Governor-General in Council for remedial legislation by the Parliament of Canada pursuant to subsection 4.

41. Trustees of Roman Catholic separate schools did not have any right or privilege "by law" with respect to the courses of study and grades of education, or the instruction to be given or the subjects to be taught in the common schools of Upper Canada at Confederation as claimed by the appellants.

42. Roman Catholic separate schools in Upper Canada were expressly subject by section 26 of the Act of 1863 (26 Vic. cap. 5) to such regulations as might be imposed from time to time by the Council of Public Instruction for Upper Canada, and to such inspection as might be directed by the Chief Superintendent of Education to secure their observance.

43. By sections 7 and 9 of the Act of 1863 the powers and duties of separate school trustees in respect of separate schools were subject, by section 119 (4) of the Common School Act of 1859 (C.S.U.C. cap. 64), to the power of the Council of Public Instruction to make such regulations as it might deem expedient for the "organization, government and discipline of (separate) schools and the classification of schools and teachers," and to such additional regulations as might be made in reference to separate schools pursuant to section 26 of the Act of 1863.

44. The "right to manage which the trustees possess—must be subject to the regulations under which all the schools must be carried on" (Ottawa Separate School Trustees v. Mackell, 1917 A.C. 62 at p. 74); or, as held by Rose, J., the separate schools "had the right to do such work as the regulations of the Council of Public Instruction should declare to be the work of common schools."

p. 212 l. 47.

45. The fact, if established, that, in exceptional cases such as the common schools of London or Hamilton, prior to Confederation, or in separate schools, special instruction was given in advanced subjects, or pupils were prepared for matriculation, with the knowledge, or approval, of the educational authorities of Upper Canada, did not confer a right by law to Roman Catholic separate school boards to give such instruction.

46. The right or privilege reserved in provision 1 is a legal right or privilege and does not include any practice, instruction or privilege of a voluntary character which at the date of the passing of the B.N.A. Act might be in operation.

Per Lord Buckmaster—Ottawa Separate Schools v. Mackell, 1917, A.C. at p. 69, citing City of Winnipeg v. Barrett, 1892, A.C. 445.

47. The fact is that at, and for some time prior to, Confederation, as the result of the Common Schools Act of 1850 as amended and consolidated in chapter 64 of the Consolidated Statutes of 1859 and of the Acts relating to grammar schools passed in 1853 and in 1865, the position of the common schools in the educational system of Upper Canada as the primary schools, with the grammar schools as the "intermediate schools between the common "schools and the university" (exhibit 33; Grammar School Manual, 1866) had been clearly defined by law; and the instruction and courses of study to be given in the common schools had been officially determined by regulations, instructions and programmes of study made and issued by the Council of Public Instruction pursuant to the foregoing enactments in that behalf. p. 150, ll. 9-16; p. 152, ll. 26-30.

48. The official programmes of studies for grammar and common schools contained in exhibits 44, 32 and 33 and in exhibit 5 (a) (Appendix H to exhibit 46) for Roman Catholic separate schools establish that at Confederation the authorized courses of study and grades of education in the common schools were limited to elementary instruction.

49. As pointed out by the Chief Justice of Ontario there were fundamental differences between the common schools and the grammar schools of Upper Canada at Confederation, and, in particular, with respect to their appointment, the area of their jurisdiction and the branches of education to be given in them.

50. The appellant's contention that the provisions of section 79 (8) of the Common Schools Act of 1859, whereby trustees of urban schools were empowered to determine "the number, sites, kind and description" of the schools, empowered trustees of common schools, and thereby of separate schools (26 Vic. cap. 5, sec. 7), in their discretion to determine the courses of study to be taught or given in the common schools, subject only to the right of the Council of Public Instruction to determine the text-books, is untenable.

51. The "kind and description" of schools that urban trustees could determine was a kind and description of a common school giving such instruction and teaching such subjects as the Council of Public Instruction should prescribe by regulation. This expression has, in the view of the Judicial Committee, a limited meaning; and seems to have a reference to the character of the school, for example, a girl's school; a boy's school; or an infant's school.

(Ottawa Separate School Trustees v. Mackell, 1917, A.C. 62, p 71.) A similar construction was placed on these words in a case decided by the Ontario courts as early as 1871 (re Hutchison v. St. Catharines School Trustees, 31 U.C.R. 274.)

52. The fact that it was the duty of rural trustees to permit all residents between the ages of 5 and 21 years to attend the school does not support the appellant's further contention that the trustees of common schools at Confederation were empowered to give such instruction in the schools as the trustees might determine to be suitable for any advanced pupil of an age up to 21 years. A pupil of that age attending the school took the school as he found it, and received such instruction as was given therein, subject to, and in accordance with, the regulations of the Council of Public Instruction.

53. In 1871 the name "Common School' was changed to "Public School" and it was provided that the public schools should be free schools (34 Vic. cap. 33, sec. 1). The name "Grammar School" was changed by the same statute to "High School" (sec. 34). Prior to that change, the expression "high school" seems to have been synonymous with "central school," a designation applied to the central common school as distinct from a "ward school" in a city or town. High schools are in substitution for the grammar schools of the late province of Upper Canada, as reorganized and modified by Ontario legislation from time to time.

54. Continuation schools are new secondary schools created by the Legislature to do some of the secondary work of the old grammar schools. They were established in order that pupils in rural and in small urban districts might conveniently obtain two or more years of high school training in their own locality.

55. The appellants further contend that the suppliant, the rural board in the Township of Tiny, is entitled to judgment for $736.00 as prayed, as the difference between the amount awarded to it out of the legislative grant for 1922 and the amount it would have received under the Act of 1863, on the assumption that separate schools are entitled to share in the sums granted to the secondary schools. It is claimed, in the alternative, if it should be held that they are not so entitled, that this suppliant should have judgment for $647.00, on the basis of average attendance.

As it did not sustain any financial loss, no similar claim is made by the urban board.

56. Section 20 of the Act of 1863 is limited to grants made or to be made by the late Province of Upper Canada and should not be extended to include, or apply to, the Legislature of Ontario. The word "province" does not apply to the Province of Ontario.

57. Section 129 of the British North America Act which enacts that "all laws enforced in Canada . . . shall continue in Ontario, Quebec . . . "as if the union had not been made" does not assist the appellants. As Mr.
p. 219 l. 40 Justice Rose observes, "to enact that a law shall continue in force after the "Union is not to declare that the meaning of that law shall be changed by the "Union, and there is nothing in the British North America Act to indicate "that a law relating to the distribution of monies voted by the Legislature "of the Province of Canada should, after the Union, govern the distribution "of monies voted by the Legislature of Ontario."

58. The "fund annually granted by the Legislature of this Province for "the support of Common Schools" means and is limited to the "Common "School Fund" created by the Province of Canada for support of common schools and then existing, with a statutory provision for an annual grant to implement the income of the fund.

59. The words "all other public grants, investments and allotments for Common School purposes now made or hereafter to be made by the province or the municipal authorities" were added to the Separate Schools Act of 1859 (C.S.U.C. cap. 65) to make it clear that separate schools should share with other common schools in any application of "the municipalities fund" from Clergy Reserves by the legislature or any municipality, pursuant to the Clergy Reserves Act (C.S.C. cap. 25, sec. 11) for the purposes of common schools

60. The sole object and effect of section 20, in keeping with the desire of the Parliament of Canada to bring these separate schools in harmony with the common schools, was to put the separate schools in the same position as other common schools in Upper Canada with respect to legislative grants of the Province of Canada, whether made by the legislature or the municipal authorities of that province, for common school purposes.

61. The legislative grant of 1922 was not within the description of any "public grant made—for common schools purposes" which means a specific and completed grant, free from conditions. There was nothing in the Act of 1863 to preclude even the Province of Canada from making its assistance to common schools conditional upon some action of the school to meet the requirements of the time.

62. The right of a separate school under section 20 is not an absolute right; but is a right to "share," which means to participate in a grant according to the terms and conditions on which the grant is made. The right to a "share" is a right to a "share" in an apportionable or shareable fund capable of apportionment according to average attendance or on some arithmetical basis.

63. The sole right under section 20 was a right to share in monies of a fund that had reached the municipality and were shareable on a basis of average attendance. The section in no way controls the amount of school funds a municipality was to receive.

64. Under the Common School Act of 1859 (sec. 106 (1)) the chief superintendent of education was to apportion annually all monies granted by the Legislature for the support of common schools in Upper Canada "and not otherwise appropriated by law" to the several municipalities according to population, as therein provided. The only monies available for distribution in which separate or common schools were entitled to share were monies not otherwise appropriated by law.

64. All the grants made during the year 1922 pursuant to the impeached enactments and of which the appellants complain were "appropriated by law" within the meaning of section 106 of the Act of 1859 for special purposes; and would not have been apportionable in 1867.

65. The right to "share" in a grant made upon conditions implies that the right is subject to compliance with the prescribed conditions.

66. There is no evidence that the Acts and regulations impeached prejudicially affect any class of persons within subsection 1 of section 93 of the B.N.A. Act. The only evidence of prejudice is that the rural board in Tiny township received less money in 1922 under the Acts and regulations then in force than it would have received if a grant had been on the basis of average attendance. Separate schools which comply with the conditions receive a much larger grant than they would receive on a basis of average attendance at Confederation.

67. The appellants attack the Acts and regulations according to their financial effect. But the financial effect varies. It is inconceivable that the Acts and regulations which are impeached should be valid as to some separate schools and invalid as to others depending upon the amount of money received.

68. The Acts and regulations that are impeached must be assumed to be in the best interests of the elementary schools of the Province designed to secure increased efficiency and to meet the necessities of education in the Province.

69. If the appellants are right in their contention, the statutes and regulations must be treated as null and void; and in that view no legislative grants have been made in which the appellants are entitled to share.

70. No right or privilege claimed in these proceedings is a right or privilege with respect to denominational schools within subsection 1 of section 93 of the British North America Act; and if any such right or privilege comes under section 93 at all, it falls within subsection 3, rather than subsection 1, of that section.

71. The suppliant, the rural board, is not a "class of person" within subsection 1 of section 93. The class of persons within the meaning of that subsection is the whole class of persons within the operation of the legislation and who are affected by it.

72. The Respondent submits that the appeal should be dismissed for the foregoing reasons and for those stated in the judgments of the Provincial Courts.

W. N. TILLEY.

McGREGOR YOUNG.